

## **Agenda**

### **D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING**

Tuesday, December 9, 2014 at 11:00 a.m.

Location: 1100 4<sup>th</sup> Street, SW, Suite 380E

Washington, DC 20024

- I. Call to Order**
- II. Ascertainment of Quorum**
- III. Adoption of Agenda**
- IV. Minutes Reviewed from Previous Meeting**
- V. New Business**

#### **A. Public Comments**

#### **B. Summary of Cases**

**1. James Washington v. D.C. Public Schools, Division of Transportation, OEA Matter No. 1601-0292-10** – Employee worked as a Bus Attendant with Agency. Agency terminated Employee from his position for job abandonment. Employee filed a Petition for Appeal with OEA contending that he was removed despite providing documentation to Agency from his doctor.

Agency responded by arguing that Employee failed to report to work on September 8, 2009, and he never returned. Accordingly, Agency removed Employee for abandonment. Agency explained that removal was within the range of penalties for abandonment. As a result, it requested that Employee's appeal be denied.

The OEA Administrative Judge ("AJ") held that Employee was granted leave from June 4, 2009 through August 18, 2009; he was on leave without pay on August 31 and September 1, 2009; he received regular pay from September 2-4, 2009; Employee got holiday pay on September 7, 2009; and he was on leave without pay again from September 8, 2009 through April 12, 2010. Because Employee failed to return to work after September 8, 2009, the AJ ruled that he was absent for more than ten consecutive days which constitutes abandonment of his job. The AJ also determined that the penalty of removal was appropriate under the circumstances. She found that Agency's witnesses offered credible testimony to corroborate Employee's unauthorized absences. Moreover, the AJ opined that the documents from the Veteran's Hospital were not authenticated by any witnesses, and she found their probative value to be diminutive compared to Agency's evidence and witness testimony. Therefore, Agency's removal action was upheld.

Employee filed a Petition for Review with the OEA Board on September 4, 2013. He argues that one of Agency's witnesses' testimonies was not relevant because she was not employed by Agency during the time of his removal. Employee further claims that another Agency witness offered false testimony. He asserts that he made numerous attempts to return to work from September 15 through October 2009, but those attempts were denied by Agency. As for the authenticity of the notes from the Veteran's hospital, Employee provided another note stating that the previous two notes were authentic and written by Clinical Psychologist Vanessa L. Moore. Accordingly, Employee requests that the OEA Board reverse the Initial Decision.

Agency filed its Response to Employee's petition on September 18, 2013. It submits that Employee was provided several opportunities within a six-month period to resolve his employment issues. However, he never provided Agency with any documentation from his doctor showing that he could return to work. It contends that because Employee was away from his position for one hundred and thirty-six days without authorization, he neglected his duties and failed to carry out tasks assigned to him.

**2. Gloria Evans v. D.C. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0055-11** – Employee worked as a Program Analyst with Agency. Agency issued a Final Decision on Enforced Leave providing that in accordance with Chapter 16, Section 1620 of the District Personnel Manual ("DPM"), Employee was placed on enforced leave for being (1) indicted on, arrested for, or convicted of a felony charge (including conviction following a plea of nolo contendere). Felony charge: possession with intent to distribute PCP and (2) indicted on, arrested for, or convicted of any crime (including conviction following a plea of nolo contendere that bears a relationship to [her] position of Program Analyst. The specific crimes are as follows: (1) possession with intent to distribute – PCP; (2) driving under the influence of alcohol/drugs; (3) reckless driving; and (4) operating (a vehicle) while impaired.

Employee filed a Petition for Appeal with OEA arguing that Agency's enforced leave action against her was unfair because it failed to consider her substance abuse problem. Agency filed its Response to Employee's Petition for Appeal and contended that the matter should be dismissed as moot because Employee pled guilty to the felony charges against her and submitted a letter of resignation to Agency.

To address the resignation issue, the AJ issued an Order on Jurisdiction. In the order, she ruled that Employee had the right to appeal the enforced leave action and that her resignation was a separate issue. Subsequently, the AJ requested that the parties submit briefs on the enforced leave action.

In her Pre-hearing Statement, Employee argued that Agency did not recognize substance abuse as a medical condition. Moreover, she provided that she sought treatment through the Employee Assistance Program ("EAP"). As a result, Employee requested that her annual leave, compensatory time, and lost pay be restored.

Agency provided that it had official documentation from police officers detailing Employee's arrest on felony charges. Additionally, it contended that Employee's signed plea agreement provided evidence to support its decision to place her on enforced leave. Moreover, it provided that its management and Human Resources personnel were unaware that Employee was in treatment through the District's EAP. However, it explained that even if it was aware of Employee's treatment, her reckless behavior demonstrated the potential safety risk to her co-workers and the youth within the Department of Youth Rehabilitation Services. Accordingly, Agency reasoned that the enforced leave action was based on substantial evidence and requested that Employee's appeal be dismissed.

The AJ issued her Initial Decision in this matter on June 27, 2013. She found that the Metropolitan Police Department Arrest/Prosecution Report served as substantial evidence to support Agency's decision to place Employee on enforced leave. Moreover, she found no procedural errors in Agency effectuating the enforced leave action in accordance with DPM § 1620. Additionally, she held Employee's resignation was indeed voluntary. Therefore, she upheld the enforced leave action.

On September 5, 2013, Employee filed a Petition for Review with the OEA Board. She contends that her direct supervisor knew of her treatment through the EAP and that typically employees are provided with three opportunities to seek help through the EAP. Employee informed the OEA Board that she successfully completed the Substance Abuse Program and counseling as a condition

of her plea agreement. Additionally, Employee highlighted the projects that she completed while with Agency. She again reiterates that she did not voluntarily resign from her position. Thus, she requests that the AJ's decision be reconsidered.

**3. Charlotte Clipper v. D.C. National Guard, OEA Matter No. 1601-0125-11** – Employee worked as a Supervisory Human Resources Specialist with Agency. Agency removed Employee from her position as the result of malfeasance, insubordination, and neglect of duty. Thereafter, Employee filed a Petition for Appeal with OEA. On September 16, 2011, the AJ issued her Initial Decision in this matter. She explained that Employee did not submit the jurisdictional brief, as ordered. Because the time limit for filings is mandatory, the AJ dismissed the case for lack of jurisdiction.

However, the OEA Board held that when it relocated, it experienced some challenges receiving its mail. It held that Employee provided adequate proof that her appeal was mailed and should have been received by OEA within a timely manner. Thus, the Board vacated the Administrative Judge's Initial Decision and remanded the matter to her for a consideration of the case on its merits.

The AJ requested briefs from both parties on the merits of the adverse action claims against Employee. However, before submitting its brief, Agency filed a Motion to Dismiss Employee's appeal. It provided that it was informed by the Federal Office of Personnel Management that Employee had been receiving retirement annuities since June 1, 2011. It was Agency's position that because Employee voluntarily retired, then OEA lacked jurisdiction to consider her appeal.

Subsequently, the AJ requested that Agency file a copy of Employee's full personnel record and that Employee respond to the jurisdictional issue regarding her retirement. Agency submitted Employee's personnel record on July 26, 2013. On August 5, 2013, Employee responded to the jurisdictional issue by arguing that the effective date of her termination was May 20, 2011. She explained that she was in a paid status with Agency through the pay period ending on May 21, 2011. Employee contended that her retirement application was dated May 22, 2011, and she was not informed until July 8, 2011, that her retirement application was received.

The AJ issued her Initial Decision on August 26, 2013. She held that Employee's personnel record included a copy of her retirement application and a letter from Employee dated May 22, 2011. However, the AJ found that the effective date of Employee's retirement was May 20, 2011. She reasoned that Employee's retirement was voluntary as evidenced by an Employee submission of an application for immediate retirement. Therefore, the AJ dismissed Employee's Petition for Appeal for lack of jurisdiction.

On September 9, 2013, Employee filed a Petition for Review with the OEA Board. In her petition, she alleges that she did not apply for or receive approval for retirement prior to her termination. Additionally, Employee provided an overview of the procedural history of her case. It is her contention that the procedural history highlights Agency's violation of her employment rights.

**4. Joe Berdin v. D.C. Public Schools, OEA Matter No. 2401-0039-11** – Employee worked as a Placement Specialist with Agency. Agency issued a notice of final decision removing Employee from his position effective November 21, 2010, due to a reduction-in-force ("RIF"). Employee filed a Petition for Appeal with OEA arguing that the RIF was procedurally and substantively flawed; that the RIF was a pre-text; and that the work he performed was now being done by other individuals.

In its response, Agency explained that the Non-Public Unit ("NPU") of the Office of Special Education was the competitive area for the RIF, and all non-management positions within the NPU were eliminated to reduce costs. Placement Specialist was one of the positions within NPU that was

eliminated. Agency contended that because all of the positions within the competitive level were eliminated, then one round of lateral competition was not required. It also explained that it provided Employee with the required thirty-day notice before removing him. Therefore, it requested that Employee's appeal be dismissed.

Before issuing her final decision in this matter, the AJ ordered the parties to issue briefs on the RIF action. Employee's brief provided that in accordance with D.C. Official Code § 1-624.08, each agency head is authorized to identify positions to be abolished in a RIF. However, Employee contended that Michelle Rhee was not the Agency head on October 22, 2010, when his notice was issued. He alleged that Michelle Rhee's resignation was issued on October 13, 2010. Therefore, the RIF was improper and failed to comply with D.C. Official Code § 1-624.08. Additionally, among other things, Employee raised several claims regarding the budgetary necessity of the RIF action.

Agency filed its brief and made the same arguments provided in its response to Employee's appeal. Additionally, it argued that Michelle Rhee was specifically authorized to conduct the RIF. It contended that Ms. Rhee performed her role as Chancellor until her effective resignation date of November 2, 2010. Employee received his RIF notice on October 22, 2010, before Chancellor Rhee's resignation. Therefore, Agency explained that because Michelle Rhee was the head of Agency, the RIF was properly executed.

The AJ issued her Initial Decision on this matter on July 26, 2013. She held that it was adequately proven that Employee's entire competitive level was eliminated. As a result, she reasoned that there was no need for one round of lateral competition. Additionally, the AJ found that Agency provided the required thirty days' notice. As for Employee's budgetary allegations, the AJ held that OEA lacked authority to determine whether the RIF was the result of bona fide budget constraints. Accordingly, Agency's RIF action was upheld.

On September 4, 2013, Employee filed a Petition for Review with the OEA Board. Employee presents the same arguments that were raised before the AJ. Specifically, he asserts that a hearing should have been held to address who was the Agency head at the time of his RIF; whether proper consideration was given to the competitive area and competitive level in this case; and whether there was a budget crisis to justify the RIF.

**5. Breona Harrison v. D.C. Public Schools, OEA Matter No. 2401-0038-11** -- Employee worked as a Placement Specialist with Agency. Agency issued a notice of final decision removing Employee from her position effective November 21, 2010, due to a RIF. Employee filed a Petition for Appeal with OEA arguing that the RIF was procedurally and substantively flawed; that the RIF was a pre-text; and that the work he performed was now being done by other individuals.

In its response, Agency explained that the NPU of the Office of Special Education was the competitive area for the RIF, and all non-management positions within the NPU were eliminated to reduce costs. Placement Specialist was one of the positions within NPU that was eliminated. Agency contended that because all of the positions within the competitive level were eliminated, then one round of lateral competition was not required. It also explained that it provided Employee with the required thirty-day notice before removing her. Therefore, it requested that Employee's appeal be dismissed.

Before issuing her final decision in this matter, the AJ ordered the parties to issue briefs on the RIF action. Employee's brief provided that in accordance with D.C. Official Code § 1-624.08, each agency head is authorized to identify positions to be abolished in a RIF. However, Employee contended that Michelle Rhee was not the Agency head on October 22, 2010, when her notice was issued. She alleged that Michelle Rhee's resignation was issued on October 13, 2010. Therefore,

the RIF was improper and failed to comply with D.C. Official Code § 1-624.08. Additionally, among other things, Employee raised several claims regarding the budgetary necessity of the RIF action.

Agency filed its brief and made the same arguments provided in its response to Employee's appeal. Additionally, it argued that Michelle Rhee was specifically authorized to conduct the RIF. It contended that Ms. Rhee performed her role as Chancellor until her effective resignation date of November 2, 2010. Employee received his RIF notice on October 22, 2010, before Chancellor Rhee's resignation. Therefore, Agency explained that because Michelle Rhee was the head of Agency, the RIF was properly executed.

The AJ issued her Initial Decision on this matter on July 26, 2013. She held that it was adequately proven that Employee's entire competitive level was eliminated. As a result, she reasoned that there was no need for one round of lateral competition. Additionally, the AJ found that Agency provided the required thirty days' notice. As for Employee's budgetary allegations, the AJ held that OEA lacked authority to determine whether the RIF was the result of bona fide budget constraints. Accordingly, Agency's RIF action was upheld.

On September 4, 2013, Employee filed a Petition for Review with the OEA Board. Employee presents the same arguments that were raised before the AJ. Specifically, she asserts that a hearing should have been held to address who was the Agency head at the time of her RIF. Similarly, she submits that a hearing should have taken place to give proper consideration to the competitive area and competitive level in this case. Finally, she argues that a hearing should have occurred to determine if there was a budget crisis to justify the RIF.

### **C. Motion to Expedite**

**1. Derek Gadsden v. Department of General Services, OEA Matter No. J-0065-14** – Employee filed a Petition for Review on May 9, 2014. He motioned to expedite the Board's review of his case because he is a father of two who is experiencing extreme financial difficulties.

**D. Deliberations** – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Official Code § 2-575(b)(13).

### **E. Open Portion Resumes**

### **F. Final Votes on Cases**

### **G. Public Comments**

## **VI. Adjournment**